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14 UNITED STATES DISTRICT COURT
15 NORTHERN DISTRICT OF CALIFORNIA

16 DEV ANAND OMAN, TODD EICHMANN,
17 MICHAEL LEHR, and ALBERT FLORES,
18 individually, on behalf of others similarly
19 situated, and on behalf of the general public,

20 Plaintiff,

21 vs.

22 DELTA AIR LINES, INC.,

23 Defendant.

24 Case No. 3:15-cv-00131-WHO

25 **SUPPLEMENTAL MEMORANDUM
26 IN SUPPORT OF PLAINTIFFS'
27 UNOPPOSED MOTION FOR
28 PRELIMINARY APPROVAL**

29 Judge: Honorable William H. Orrick

1 Plaintiffs Todd Eichmann and Albert Flores (“Plaintiffs”) and Defendant Delta Air Lines,
 2 Inc. (“Delta”) (collectively, “the Parties”) make this joint submission responding to the issues
 3 raised by the Court at the hearing on Plaintiffs’ Motion for Preliminary Approval of Class/PAGA
 4 Settlement and in the Court’s Minute Order issued on June 20, 2024 (“June 20 Minute Order”).
 5 ECF No. 156.

6 **I. The Scope of the Settlement Release Is Appropriate.**

7 Pursuant to the Parties’ proposed Stipulation of Class and PAGA Action Settlement and
 8 Release, in exchange for receiving significant settlement payments, the Class Members who do
 9 not request to be excluded and preserve their claims would release a narrow subset of wage and
 10 hour claims based on the factual allegations pled in Plaintiffs’ complaints, including causes of
 11 actions adjudicated in this case. Specifically:

12 all claims...and causes of action that were litigated in the Action...as well as claims
 13 that could have been pled in this Action based on the factual allegations contained
 14 in the operative Fourth Amended Complaint, any preceding complaints, and/or any
 15 further amended complaints...including, without limitation, all claims for alleged
 16 violation of the California Labor Code and IWC Wage Order No. 9 for failure to
 17 pay minimum wage, failure to provide accurate wage statements, failure to timely
 18 pay wages, and failure to pay earned wages at the end of employment stemming
 19 from unpaid wages, as well as penalties under PAGA relating to such unpaid
 20 minimum wages, wage statements, and timely payment of wages.

21 In the July 20 Order, the Court asks what the legal justification is for releasing “all wage and hour
 22 claims raised at any time in the plaintiffs’ complaints” focusing on the inclusion of the minimum
 23 wage and derivative waiting time claims that were previously dismissed as to Plaintiffs only.

24 As outlined below, the release of those claims is wholly appropriate under the Ninth
 25 Circuit’s identical factual predicate test, because it only releases claims that have been pled in this
 26 action. Further, Plaintiffs respectfully submit that the settlement delivers excellent value to the
 27 class even with the release of those claims, because the decisions from this Court and the

1 California Supreme Court effectively adjudicated the minimum wage claims for all class
 2 members under Plaintiffs' theory (i.e., the facts alleged in the complaint). Moreover, given the
 3 result in *Naranjo II*—handed down after the parties settled the case—it would be impossible for
 4 Plaintiffs to secure the same deal in a renegotiated agreement. Forcing Plaintiffs to renegotiate the
 5 release post-*Naranjo II* will almost certainly result in less money to the class, in the name of
 6 preserving an empty right to bring claims that, for all practical purposes, were fully adjudicated in
 7 Delta's favor.

8 A. **The Release is Justified Because it is Based on the Identical Factual Predicate**
 9 **as the Complaint**

10 The Ninth Circuit utilizes the “identical factual predicate” test to determine the proper
 11 scope of a release in a class action. *Hesse v. Sprint Corp.*, 598 F.3d 581, 590 (2010). Under this
 12 test, a class settlement “may preclude a party from bringing a related claim in the future ‘even
 13 though the claim was not presented and might not have been presentable in the class
 14 action,’ but only where the released claim is ‘based on the identical factual predicate as that
 15 underlying the claims in the settled class action.’” *Id.* (quoting *Williams v. Boeing Co.*, 517 F.3d
 16 1120, 1133 (9th Cir. 2008).) Here, the settlement agreement comports with the “identical factual
 17 predicate test” because it only releases claims that have been and “could have been pled in this
 18 Action based on the factual allegations contained in the operative Fourth Amended Complaint,
 19 any preceding complaints, and/or any further amended complaints, continuing through March 31,
 20 2024” (ECF No. 150-2, ¶ 28.) The release, thus, includes the minimum wage claims based
 21 on the facts alleged in the complaint and claims for the failure to pay earned wages at the end of
 22 employment stemming from those unpaid minimum wages. (*Id.*) This release is proper, and
 23 commonly accepted under the identical factual predicate test. *See, e.g., Rangel v. PLS Check*
 24 *Cashers of California, Inc.*, 899 F.3d 1106, 1111 (9th Cir. 2018) (discussing as “common and
 25 unobjectionable” a settlement release provision that referred to claims “based on the factual
 26 allegations in the Complaint.”).

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1 A review of the complaint, this Court’s summary judgment order, and the Supreme
 2 Court’s decision reveals that the Supreme Court’s decision eliminated all California minimum
 3 wage claims that would be covered by the release, regardless of the procedural posture of the
 4 underlying summary judgment decision. Because no minimum wage claims based on the facts
 5 alleged in the complaint survived the Supreme Court’s decision, the release is not overbroad.
 6 And to the extent a putative class member disagrees, they have ample opportunity to exclude
 7 themselves from the class and settlement and preserve their rights to pursue the claims covered by
 8 the release.

9 To recap the litigation history: Plaintiffs’ minimum wage claims focused on Delta’s Work
 10 Rules. Plaintiffs pled that “Defendant’s pay structures are set out in Defendant’s ‘Work Rules,’
 11 and Defendant admits that it applied these rules when paying its flight attendants, including
 12 Plaintiff.” (Compl., ECF No. 1, ¶ 13; First Amended Complaint (“FAC”), ECF No. 24, ¶ 17;
 13 Second Amended Complaint (“SAC”), ECF No. 52, ¶ 13.) The complaints alleged that, under
 14 Delta’s Flight Pay Formula, “Plaintiffs and Class Members are not paid for, among other things,
 15 work performed at the airport before or after their flight, for time spent onboard the aircraft before
 16 the doors are closed, or for time spent at the airport between flights. Additionally, if a flight is
 17 delayed prior to boarding, flight attendants paid under the Flight Pay formula are not paid for time
 18 spent waiting.” (Compl. ¶ 17; FAC ¶ 21; SAC ¶ 23.) Plaintiffs further alleged that “[b]ecause
 19 Delta pays its flight attendants primarily under the Flight Pay formula, Delta regularly fails to pay
 20 its flight attendants for all hours worked.” (Compl. ¶ 18; FAC ¶ 22; SAC ¶ 24.) Plaintiffs alleged
 21 that Delta’s “Duty Period Credit Pay formula only pays flight attendants for half their hours
 22 worked.” (Compl. ¶ 19; FAC ¶ 23; SAC ¶ 25.) Plaintiffs alleged that the Duty Period Average
 23 and Trip Credit formulas also failed to pay for all hours worked. (Compl. ¶ 21; FAC ¶ 25; SAC ¶
 24 27.)

25 In their minimum wage cause of action, Plaintiffs pled: “California law does not allow an
 26 employer to establish compliance with minimum wage requirements by averaging rates earned by
 27 an employee over an entire shift. **Each of Defendant’s compensation schemes** violate

1 California's minimum wage requirements because they fail to pay Plaintiff and Class Members
 2 for all hours worked." (Compl. ¶ 39; FAC ¶ 43; SAC ¶ 46 (emphasis added).) The Amended
 3 Complaint and Second Amended Complaints attached relevant sections of the Work Rules. (ECF
 4 No. 24-1; ECF No. 52-1.)

5 The complaints also alleged derivative waiting time claims based on the same facts:
 6 "[b]ecause Defendant did not pay Plaintiff[s] for all hours worked, Defendant did not provide
 7 Plaintiff and other flight attendants all wages owed at the time they were no longer employed by
 8 Defendant." (Compl. ¶ 23; FAC ¶ 22; SAC ¶ 24.) The waiting time cause of action pleads:
 9 "Plaintiff and Class Members are entitled to unpaid minimum wages, but to date have not
 10 received all such compensation. Defendant has committed and continues to commit the acts
 11 alleged herein knowingly and willfully, with the wrongful and deliberate intention of injuring
 12 Plaintiff and Class Members, in conscious disregard of Plaintiff's and Class Members' rights."
 13 (Compl ¶ 64; FAC ¶ 68; SAC ¶ 53.)

14 In granting Delta's motion for summary judgment, this Court focused on the operation of
 15 the work rules. It held: "**Delta's Work Rules** do not implicate the wrongs identified in *Armenta*.
 16 Delta is not arguing, as the *Armenta* defendant did, that it can avoid paying Flight Attendants for
 17 certain hours on Duty because when considering all hours on Duty the average amount earned
 18 exceeds California's minimum wage floor. Delta is instead applying formulas that expressly
 19 consider all hours worked in the first instance." *Oman v. Delta Air Lines, Inc.*, 153 F. Supp. 3d
 20 1094, 1104 (N.D. Cal. 2015) (emphasis added). The Court further held: "**Delta's Work Rules** do
 21 not suffer from the defect identified by the *Cardenas* court, where the applicable pay formula did
 22 not 'calculate' for the pre and post shift duties required by the employer. Instead, **the Work**
 23 **Rules expressly consider all hours worked**, and a Flight Attendant will always be paid the
 24 highest value for each Rotation worked under the applicable formulas." *Id.* at 1105 (emphasis
 25 added). And the Court held: "**Delta's Work Rules ensure that Flight Attendants are paid for**
 26 **all hours worked**, based on the minimum guarantee in the Bid Packet and considering all hours

1 worked during a Rotation.” *Id.* at 1105–06 (emphasis added). The Court concluded its decision by
 2 holding:

3 The facts of *Gonzalez*, like each of the other cases relied upon by plaintiffs, are
 4 significantly different from the facts before me. Delta is not attempting to avoid
 5 paying an agreed-to hourly rate for specific tasks and is not using a post-hoc
 6 averaging to ensure the state’s minimum wage floor is met (as allowed by FLSA).
 7 Delta’s Work Rules function in a different, fully-disclosed way to ensure that Flight
 Attendants are paid for each hour worked on their Rotations. **Delta’s Work Rules**
do not violate California’s minimum wage requirements and, therefore,
summary judgment must be granted to defendant.

8 *Id.* at 1106 (N.D. Cal. 2015) (emphasis added). In sum, while this Court’s decision on the
 9 minimum wage claims was reached before class certification, it was grounded in an analysis of
 10 the way Delta’s compensation rules operate broadly and was not driven by facts specific to the
 11 Named Plaintiffs.

12 This case arrived at the California Supreme Court on certified questions. Regarding the
 13 minimum wage claim, the question was “Does the *Armenta/Gonzalez* bar on averaging wages . . .
 14 apply to a pay formula that generally awards credit for all hours on duty, but which, in certain
 15 situations resulting in higher pay, does not award credit for all hours on duty?” *Oman v. Delta Air*
 16 *Lines, Inc.*, 9 Cal. 5th 762, 772 (2020) (citations omitted) (emphasis added). Like this Court, the
 17 Supreme Court reviewed the operation of Delta’s work rules, as opposed to Plaintiffs’
 18 individualized work experiences, to adjudicate the minimum wage claim. And like this Court, the
 19 Supreme Court found that the **Work Rules comply with the law**. The Court first found that
 20 “Delta’s Work Rules, which are disclosed to all its flight attendants, promise to compensate
 21 attendants by the rotation rather than by particular hours worked.” *Id.* at 783. The Court then held
 22 that “**Delta’s four-formula method for calculating compensation guarantees that flight**
 23 **attendants are always paid above the minimum wage** for the hours worked during each
 24 rotation without borrowing from compensation promised for other rotations.” *Id.* at 784
 25 (emphasis added). The Court rejected Plaintiffs’ arguments that the work rules engaged in
 26 impermissible borrowing, finding that Plaintiffs’ “reading [of the work rules] is unsound.” *Id.* at
 27 785. In affirming this Court, the Supreme Court held definitively that Delta’s pay structure does
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1 not violate California's minimum wage laws: "**Delta's Work Rules** reflect a promise to pay by
 2 the rotation, and for each rotation, the compensation Delta promises will, no matter which of the
 3 four formulas applies, always exceed the state minimum wage per hour worked. Thus, **Delta**
 4 **satisfies state minimum wage law** without ever needing to compromise its contractual
 5 commitments." *Id.* at 788 (emphasis added).

6 In short, the parties' cross motions for summary judgment were designed to test the
 7 legality of Delta's Work Rules, and that is what they did. The California Supreme Court spoke in
 8 no uncertain terms when it held that the Work Rules do not violate the law. By ruling in this way,
 9 the California Supreme Court eliminated **all potential minimum wage claims** (and derivative
 10 waiting time claims) based on the facts alleged in the complaint; namely, that Delta's Work
 11 Rules, by their operation, fail to compensate flight attendants for all hours worked by treating
 12 certain work periods as unpaid. Those are the only minimum wage claims that are eliminated as
 13 part of the release. The nature of the Supreme Court's decision means it is irrelevant that the
 14 appeal technically involved only the named Plaintiffs' minimum wage claims.¹ The release is
 15 proper under Ninth Circuit case law because it is tied to the facts alleged in the complaint,
 16 including claims that were resolved during the course of litigation.

17 **B. The Settlement Appropriately Values the Claims Being Released.**

18 A related question is whether the settlement properly values released claims. *See In re*
 19 *Uber FCRA Litig.*, No. 14-CV-05200-EMC, 2018 WL 2047362, at *4 (N.D. Cal. May 2, 2018)
 20 (class settlements may release claims not asserted in the case, but "the adequacy of a settlement
 21 must take into account not only the potential verdict value of the claims brought in the suit, but
 22 the potential value of claims released"). Here, the value of class members' California minimum
 23 wage claims is zero, based on the Supreme Court's decision. Accordingly, it is completely
 24 appropriate that the settlement assigns no value to the eliminated claims. For example, in *Uber*
 25 *FCRA Litigation*, Judge Chen considered an objection asserting that the class release included
 26 individual state law claims for statutory penalties that were not pled in the case. *See id.*

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 28 ¹ The current version of Delta's work rules applies essentially the same structure that Plaintiffs'
 challenged in this case. *See* Frederick Decl. Exs. 1-2.

1 Judge Chen held the settlement was reasonable and appropriate even though it delivered less than
 2 1% of potential verdict value even *without* considering these statutory claims, and that “[t]he
 3 added value of ICRAA and other claims released does not materially change the calculus.” *Id.*
 4 The same is true here; because the likelihood of recovering anything for the minimum wage and
 5 derivative waiting time claims released in the settlement is zero, the inclusion of these claims
 6 “does not materially change the analysis.” *Id.* And if any individual class member wants to pursue
 7 those released claims they “may opt out and pursue that claim on an individual basis.” *Id.*

8 Similarly, Judge Carter in the Central District considered a settlement that did not allocate
 9 any funds to a claim with little chance of success. *See Vinh Nguyen v. Radient Pharms. Corp.*,
 10 2014 WL 1802293 (C.D. Cal. May 6, 2014). The court deferred to the reasoned judgment of
 11 counsel (and their experts) that the claims had no settlement value:

12 The Court sees no reason to disagree with [counsel’s] judgment of their own case
 13 on this record, and finds it is highly unlikely the in-and-out traders could prove any
 14 damages caused by Radient’s alleged misrepresentation. The Objector is correct that
 15 proving in-and-out claims is not impossible, but there is no evidence that the in-and-
 out traders *in this case* could have done so. On this basis, the plan of allocation
 reasonably does not include values for in-and-out shares. The plan of allocation
 reasonably and fairly represents injuries and claims on the merits.

16 *Id.* at *8. The same is true here. Because this Court and the California Supreme Court effectively
 17 eliminated California minimum wage claims (and derivative waiting time claims) based on the
 18 operation of the work rules, it is reasonable and appropriate that the settlement does not allocate
 19 funds to those non-existent claims. *See, e.g., In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 461
 20 (9th Cir. 2000), *as amended* (June 19, 2000) (affirming denial of an objection to a settlement that
 21 did not allocate any funds to a large portion of the class because those class members did not have
 22 cognizable damages).

23 Further, the monetary value of the settlement is more than adequate, even without
 24 allocating money to the now non-existent minimum wage claims, particularly in light of the post-
 25 settlement developments that make the claims that *are* valued in the settlement considerably more
 26 challenging. As outlined in the Motion for Preliminary Approval, the Section 226 wage statement
 27 claims are worth approximately \$2,884,200 as the case is currently situated, because the claims
 28

1 only include the period between January and October 2022. If Plaintiffs were able to obtain a
 2 reversal on appeal of this Court's decision regarding Delta's good faith defense prior to January
 3 2022, the value of those claims would have increased by over \$7.5 million.²

4 Success on that appeal would have depended on the legal standard applied to such claims
 5 of good faith—the *Naranjo II* issue. (See Plaintiffs' Motion for Preliminary Approval, ECF No.
 6 150 at 15-16.) When the parties inked the settlement agreement, *Naranjo II* had not been decided
 7 and the vast majority of the settlement value for the class was driven by the risk that the *Naranjo*
 8 *II* decision could provide Plaintiffs sufficient grounds to overturn the Court's decision here. But
 9 *Naranjo II* did not go the employees' way. As such, the appellate risk Delta potentially faced
 10 changed dramatically, and it is highly unlikely that a settlement now would produce the same
 11 value. Under the settlement, class members will receive their *full allotment of pre-January 2022*
 12 *Section 226 wage statement penalties* despite intervening authority likely eliminating their right
 13 to those penalties. Said another way, **the settlement allocates \$10,570,212.50 to claims that**
 14 **could be worth \$2,884,200 today.** The Court must consider this \$7.7 million in excess value
 15 when evaluating whether the settlement as a whole provides good value to class members.
 16 Indeed, even though the allocation does not assign weight to the minimum wage claims, the
 17 settlement will pay class members more than the present-day, realistic value of their wage
 18 statement claims. Because the likelihood of success on the minimum wage claims is close to zero,
 19 the Court need not calculate the theoretical value of these claims prior to approving the
 20 settlement. *See In re Uber FCRA Litig.*, 2018 WL 2047362, at *4.

21 Plaintiffs appreciate the Court's care in scrutinizing the settlement for the benefit of the
 22 class. But if the goal is to do what is best for the class, the Court should also consider what will
 23 happen if the parties renegotiate the settlement. If the Court declines preliminary approval or
 24 alters the scope of the release, Plaintiffs will be forced to renegotiate the settlement. (ECF No.
 25 150-2, ¶ 65 (settlement null and void if not approved), ¶ 75 (settlement agreement may only be
 26 modified by written instrument signed by the parties); *Evans v. Jeff D.*, 475 U.S. 717, 726 (1986)

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 28 ² Plaintiffs also would have sought PAGA penalties at trial, but those penalties are extremely
 uncertain and there is great risk that the Court could have awarded a small amount.

1 (“the power to approve or reject a settlement negotiated by the parties before trial does not
 2 authorize the court to require the parties to accept a settlement to which they have not agreed”).)
 3 Plaintiffs believe it is all but certain that any renegotiated settlement will deliver less money to
 4 the class. How much less depends on the parties’ best guess as to how much this Court would
 5 award in PAGA penalties and each side’s risk tolerance on that issue. Plaintiffs respectfully
 6 submit, therefore, that denying approval of the settlement will ultimately result in class members
 7 receiving less money but will not preserve any additional, viable, legal claims. Plaintiffs
 8 respectfully request that the Court approve the settlement as presented.

9 **II. The Court May Properly Consider and Approve the Proposed Consent Decree.³**

10 In its June 20 Minute Order, the Court raised the following question with respect to the
 11 proposed Consent Decree: “For what reasons should I adopt an uncontested Consent Decree that I
 12 previously refused to adopt on summary judgment?”

13 As explained below, standing exists for the Court to entertain Delta’s request for a
 14 proposed consent decree regarding its modified flight attendant wage statement, whereas standing
 15 was previously lacking. The procedural posture of this case has changed since Plaintiffs moved
 16 for class certification because the operative complaint expressly covers the period when the
 17 modified wage statement has been used, thereby placing the updated statement at issue in this
 18 case. Further, federal courts have the power to approve consent decrees presented through a
 19 proposed class settlement and have done so in similar circumstances. Under the settlement
 20 agreement, Delta requests that the Court allow it the opportunity to seek approval of the proposed
 21 consent decree, as obtaining clarity on Delta’s wage statement’s compliance with Labor Code
 22 Section 226(a) was and is a fundamental issue in this case.

23 **A. Standing Exists for the Court to Rule Upon the Proposed Consent Decree.**

24 When seeking certification of the wage statement class, Plaintiffs sought to limit the class
 25 to the period January 10, 2022 (the date by which Delta’s good faith defense had concluded)

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 27 ³ This section presented by Delta is unopposed by Plaintiffs. For ease of reading, Plaintiffs
 28 elected not to include “Defendant contends” or similar language throughout. Plaintiffs provide an
 additional statement regarding the consent decree in Section II.C., *infra*.

1 through October 7, 2022 (the date before Delta modified its wage statements to address the
 2 deficiencies the Court previously identified in its July 2022 summary judgment order). ECF No.
 3 128 at p. 1. The Court agreed that Plaintiffs could limit the class in this way and ordered
 4 Plaintiffs to file a Third Amended Complaint that conformed to this revised class. ECF No. 128
 5 at pp. 1, 6. Given that amendment, the Court determined that Delta's modified wage statement
 6 was no longer at issue in the case, as such "there [was] no case or controversy remaining" as to
 7 that statement that would provide Article III standing to adjudicate the issue. ECF No. 128 at p. 6
 8 (citing *Asetek Danmark A/S v. Shenzhen Apaltek Co.*, No. 22-cv-06179-WHO, 2023 WL
 9 3852698, at *3 (N.D. Cal. June 6, 2023)).

10 While that was true at the time, the case's procedural posture has changed, such that the
 11 modified wage statement is currently at issue in the case. Through their Fourth Amended
 12 Complaint, Plaintiffs have pled a settlement class that runs through March 31, 2024, thereby
 13 encompassing a time period during which Delta has issued the modified wage statement to
 14 settlement class members. *See Rockwell International Corp. v. United States*, 549 U.S. 457, 473-
 15 74 (2007) ("When a plaintiff files a complaint in federal court and then voluntarily amends the
 16 complaint, courts look to the amended complaint to determine jurisdiction."); *Northstar Financial*
 17 *Advisors Inc. v. Schwab Investments*, 779 F.3d 1036, 1044 (9th Cir. 2015). As such, unlike when
 18 Delta previously sought a ruling regarding the modified wage statement, standing now exists for
 19 the Court to decide this issue.

20 **B. Other District Courts Have Entertained Consent Decree Requests in Wage &**
 21 **Hour Class Settlements, Including in Similar Airline Litigation.**

22 Federal courts have the power to approve consent decrees presented through a proposed
 23 class settlement. "A consent decree is essentially a settlement agreement subject to continued
 24 judicial policing." *United States v. State of Oregon*, 913 F.2d 576, 580 (9th Cir. 1990) (citation
 25 and internal quotation marks omitted). Approval of a proposed consent decree is within the district
 26 court's discretion. *United States v. Pac. Gas & Elec.*, 776 F. Supp. 2d 1007, 1024 (N.D. Cal.
 27 2011). "Before approving a consent decree, a district court must be satisfied that it is at least
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1 fundamentally fair, adequate and reasonable.” *State of Oregon*, 913 F.2d at 580. “This requires
 2 the court to evaluate both the procedural and substantive fairness of the consent decree.” *McLeod*
 3 *v. Bank of Am., N.A.*, No. 16-cv-03294-EMC, 2019 WL 1170487, at *3 (N.D. Cal. Mar. 13, 2019);
 4 *see also City of Colton v. Am. Promotional Events, Inc.*, 281 F. Supp. 3d 1009, 1012 (C.D. Cal.
 5 2017). The consent decree must also “conform to applicable laws,” although it “need not impose
 6 all the obligations authorized by law.” *State of Oregon*, 913 F.2d at 580 81.

7 In *Vidrio v. United Airlines, Inc.*, the district court—as part of a class/PAGA settlement—
 8 approved a consent decree regarding United Airlines’ revised flight attendant wage statements
 9 similar to that which Delta seeks here.⁴ Case No. 2:15-cv-07985-PSG-MRW, ECF No. 114,
 10 Order Granting Motion for Approval of Consent Decree (June 29, 2023). Like Delta, United
 11 updated its flight attendant wage statements after the court found United did not comply with
 12 Labor Code Section 226(a)’s requirements. As part of a class/PAGA settlement, United sought a
 13 consent decree “that approves of the revised form of flight attendant wage statements and
 14

15

16 ⁴ Like United, Delta seeks confirmation from the Court that its modified flight attendant wage
 17 statements address the deficiencies the Court previously identified. However, the consent decree
 18 approved in *Vidrio* went considerably further than what Delta seeks here. For example, the
 19 *Vidrio* consent decree provides United with a “complete defense” for five years against
 20 “California Labor Code § 226 claims by California-based United flight attendants, to the extent
 21 those claims involve allegations that United’s wage statements fail to show total hours worked
 22 (pursuant to Labor Code § 226(a)(2)) or fail to show applicable hourly rates in effect during the
 23 pay period and the corresponding number of hours worked at each hourly rate by the employee
 24 (pursuant to Labor Code § 226(a)(9)) (the ‘Decree’).” Case No. 2:15-cv-07985-PSG-MRW, ECF
 25 No. 104-3, [Proposed] Order Granting Motion to Approve Consent Decree, ¶ 2 (filed May 17,
 26 2023). United similarly sought approval of the same consent decree in *Ward v. United Airlines,*
 27 *Inc.*, but with respect to pilot wage statements. There, Judge Alsup ultimately concluded that the
 28 proposed consent decree was substantively unfair because it sought a “complete defense” against
 Section 226(a)(2) and (a)(9) wage statement claims for a period of five years. *Ward v. United
 Airlines, Inc.*, No. 15-cv-02309-WHA, 2024 WL 269149, at *9 (N.D. Cal. Jan. 24, 2024) (“[T]he
 consent decree itself is fatally overbroad, purporting to constitute a complete defense against too
 broad a group of potential litigants, for too long a period of time. On those grounds, the decree is
 found to be substantively deficient, and is DENIED.”). However, in considering United’s
 request, Judge Alsup also opined that “the pilot wage statements submitted by United via
 declaration appear to conform with the plain language of Sections 226(a)(2) and 226(a)(9)”
 because they “provided the single applicable effective hourly rate, alongside total hours, in the
 pay register.” *Id.*

1 confirms they comply with California Labor Code Section 226(a)(2) and Section 226(a)(9).”

2 *Vidrio*, ECF No. 114 at pp. 20-21.

3 In evaluating United’s request, the *Vidrio* court found that “the proposed consent decree
 4 [was] both procedurally and substantively fair.” *Id.* at p. 21. First, the court found the consent
 5 decree procedurally fair because it was the “product of extensive settlement negotiations, which
 6 were conducted, in part, through arms-length discussions with [a mediator], after several years of
 7 hard-fought litigation between the parties.” *Id.*; *see also State of Oregon*, 913 F.2d at 581 (noting
 8 that a consent decree is “presumptively valid” if it is “the product of good faith, arms length
 9 negotiations”). Second, the court found the consent decree substantively fair because “it compels
 10 Defendant to revise its flight-attendant wage statements so that they more effectively state the
 11 total hours worked, the applicable effective hourly rates, and the number of hours worked at each
 12 rate, all of which are requirements of California Labor Code Sections 226(a)(2) and (a)(9).”

13 *Vidrio*, ECF No. 114 at p. 21. The court further explained that “[t]his case has also broken new
 14 legal ground in this area, and there remains uncertainty about what is required for wage
 15 statements in cases like this one. The Court thus finds that the proposed consent decree and wage
 16 statement revisions reasonably conform to the applicable law.” *Id.*; *see also State of Oregon*, 913
 17 F.2d at 581 (“The court need only be satisfied that the decree represents a reasonable factual and
 18 legal determination.” (citation omitted)); *McLeod*, 2019 WL 1170487, at *4 (explaining that with
 19 substantive fairness, the court’s task is not to decide whether “the settlement is one which the
 20 court itself might have fashioned, or considers ideal”).

21 Judge Chen has also considered an employer’s request for a consent decree in the class
 22 settlement context. In *McLeod v. Bank of America, N.A.*, the employer bank sought approval of
 23 the mileage expense reimbursement program it had implemented in response to the assertion that
 24 the bank had violated its expense reimbursement obligations under Labor Code Section 2802.
 25 2019 WL 1170487, at *3-5 (N.D. Cal. Mar. 13, 2019). In exchange for taking steps to enhance its
 26 mileage expense reimbursement compliance, the bank sought a “complete defense” against
 27 Section 2802 claims premised on this type of reimbursement. *Id.* at *4. Judge Chen found the
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1 proposed consent decree procedurally and substantively fair and approved the consent decree. *Id.*
 2 at *5. Specifically, he found that the decree “addresses Plaintiff’s concern that the Bank’s efforts
 3 to encourage reimbursement prior to this litigation were not sufficient, and addresses the Bank’s
 4 concern that, absent certainty of its legal obligations, it will face repeated litigation on mileage
 5 reimbursement for Loan Officers.” *Id.*

6 Here, whether the Court will ultimately approve the proposed consent decree will be a
 7 matter within the Court’s discretion at final approval and will not impact the settlement itself.
 8 But, as a threshold issue, the Court undoubtedly has the legal authority and power to consider the
 9 proposed consent decree that Delta will present, as evidenced by *McLeod*, *Vidrio*, and *Ward*.⁵

10 **C. Plaintiffs’ Supplemental Statement Regarding Consent Decree**

11 Plaintiffs write separately to note that any concerns the Court may have about the
 12 propriety of a consent decree should be reserved for final approval. The settlement agreement is
 13 not contingent on the Court *granting* a consent decree, it only requires that Defendant be
 14 permitted to seek one at final approval and that Plaintiffs not oppose it. (ECF No. 150-2, ¶ 28.) If
 15 the Court decides, at final approval, that the proposed consent decree is not appropriate on the
 16 merits, or if the Court decides that the consent decree is not properly before the Court, the Court
 17 could decline to enter the consent decree but still grant final approval to the settlement. *See, e.g.*,
 18 *Ward v. United Airlines, Inc.*, Case No. 3:15-cv-02309-WHA, ECF No. 162 (N.D. Cal. Jan. 24,
 19 2024) (granting final approval to settlement but denying request to enter consent decree).
 20 Accordingly, the Court’s hesitation as to whether a consent decree will prove proper is no basis to
 21 deny preliminary approval of the settlement.

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 23
 24 ⁵ Paragraph 68 of the proposed class/PAGA settlement agreement provides as follows: “Consent
 25 Decree. At the same time as the Plaintiffs move the Court for Final Approval, Delta Air Lines
 26 will move the Court to enter a proposed consent decree that approves the form of the wage
 27 statements provided to Class Members since October 8, 2022 and confirms that the wage
 28 statements address the deficiencies the Court identified in its July 8, 2022 Order (Dkt. No. 113)
 and complies with California Labor Code Section 226. Plaintiffs and Plaintiffs’ Counsel will not
 oppose Delta Air Lines’ motion to approve this consent decree.”

III. Administrator's Practice in Keeping Settlement Class Member Data Secure

Plaintiffs have separately filed a declaration from the proposed settlement administrator, Rust Consulting, that discusses Rust's practice in keeping settlement class member data secure.

IV. Conclusion

The Parties believe that this Joint Submission effectively addresses the issues that the Court has raised in connection with the requested preliminary approval of the class/PAGA settlement. With this additional information, the Parties are hopeful that the Court's concerns have been alleviated and that preliminary approval will be granted. The Parties would gladly provide the Court with any additional information it may need.

Dated: July 8, 2024

NICHOLS KASTER, LLP

By /s/ *Matthew C. Helland*
Matthew C. Helland
Daniel S. Brome

Attorneys for Plaintiffs

Dated: July 8, 2024

MORGAN, LEWIS & BOCKIUS LLP

By /s/ Andrew P. Frederick
Brendan T. Killeen
Andrew P. Frederick

Attorneys for Defendant
DELTA AIR LINES, INC.

1 I, Matthew C. Helland, am the ECF user whose identification and password are being used
2 to file this Stipulation. In compliance with Civil L.R. 5-1(h)(3), I hereby attest that Defendant's
3 counsel concurs in this filing.

4 NICHOLS KASTER, LLP
5 Dated: July 8, 2024

6 By /s/ Matthew C. Helland
7 Matthew C. Helland

8 Attorneys for Plaintiffs and the Putative
9 Class

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